WATERS AND WATERCOURSES — APPROPRIATION — BENEFICIAL USE. — The complainant improved both sides of a stream as a summer resort, the chief attractions of which were the vegetation and foliage. These owed their existence solely to the water from the stream. By a provision of the state constitution, appropriations to beneficial uses are protected. *Held*, that the complainant has made an appropriation to a "beneficial use." *Cascade Town Co.* v. *Empire Water & Power Co.*, 181 Fed. 1011 (Circ. Ct., D. Colo.).

The doctrine of prior appropriation arose through the sanction given by courts and legislatures to miners' customs, which were adopted from the necessity for an assured proprietorship of water, and the consequent inapplicability to an arid region of the common-law rule governing riparian rights. *Jennison* v. *Kirk*, 98 U. S. 453; *Reno S. Works* v. *Stevenson*, 20 Nev. 269. See POMEROY, LAW OF WATER RIGHTS, § 15. With the increasing needs of the community, the purposes to which water might be appropriated became more numerous. *Hammond* v. *Rose*, 11 Colo. 524 (irrigation); *McDonald & Blackburn* v. *Bear River, etc. Co.*, 13 Cal. 220 (milling). But a diversion with no intent to put the water to some immediate use was never recognized as a valid appropriation, for the same reasons that gave rise to the doctrine. *Combs* v. *Agricultural Ditch Co.*, 17 Colo. 146 (speculation). Aside from such instances, situations calling for the enunciation of some general principle to determine with more exactness the meaning of "beneficial uses" have rarely presented themselves to the courts. The decision of the principal case points to the conclusion that the proper test is the reasonableness of the use, with reference to all the surrounding circumstances, thus following the analogy of the common-law principles governing riparian rights. *Lawrie* v. *Silsby*, 82 Vt. 505; *Elliot* v. *Fitchburg R. Co.*, 64 Mass. 191.

WILLS — UNDUE INFLUENCE — BURDEN OF PROOF. — The will of the testatrix gave practically all of her property to her brother, who was her business adviser. A son, for whom the testatrix said she would provide, received $10. The testatrix executed the will on her deathbed and was so sick that she could neither read nor write. A few days before the execution of the will, the testatrix gave all of her cash on hand to her brother. *Held*, that the proponent has the burden of rebutting the presumption of undue influence. *In re Everett's Will*, 68 S. E. 924 (N. C.).

Two weeks after making his first will, the testator executed a second, leaving all of his property to his attorney. The attorney's partner drew the will. The attorney made a declaration of trust in favor of some of the legatees of the first will. *Held*, that the burden of proving undue influence is on the contestant. *Mordecai* v. *Canty*, 68 S. E. 1049 (S. C.).

The existence of a confidential relation between the parties to a gift or contract *inter vivos* raises a presumption of undue influence. *Archer* v. *Hudson*, 7 Beav. 551; *Burnham* v. *Heselton*, 82 Me. 495. The natural influence of a fiduciary exerted to obtain a benefit for himself is regarded by equity as undue. See *Parfitt* v. *Lawless*, L. R. 2 P. & D. 462. As to wills, influence to be undue must amount to coercion, such as to destroy the testator's free agency. *Hall* v. *Hall*, L. R. 1 P. & D. 481; *Wingrove* v. *Wingrove*, 11 P. D. 81. That no presumption of undue influence exists in the case of wills is the rule of the majority of courts. *Micheal* v. *Marshall*, 201 Ill. 70; *Baldwin* v. *Parker*, 99 Mass. 79. *Contra*, *Morris* v. *Stokes*, 21 Ga. 552, 575. The distinction is that whereas it is unlikely that one should strip himself of property during his lifetime, it is most natural that a testator should make his will in favor of those with whom he is in confidential relation. *In re Sparks*, 63 N. J. Eq. 242. The strong facts of the North Carolina case may make the actual decision correct. A similar previous case in the same state proceeds on grounds in accord with the weight of authority. *Downey* v. *Murphey*, 1 Dev. & B. 82 (N. C.). In any event, a presumption does not shift the burden of proof, but merely the burden of going forward with the evidence. THAYER, PREL. TREAT. EVID. 380–384, 575.